

Ontario Human Rights Code  
R.S.O. 1990, c. H. 19

BOARDS OF INQUIRY

BETWEEN:

Ontario Human Rights Commission

Commission

- and -

Mary Audia

Complainant

- and -

Workers' Compensation Board

Respondent

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INTERIM DECISION

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Board of Inquiry:

Elizabeth Beckett

Appearances:

Anne E. Posno  
Counsel for the Commission

Frank d'Andrea  
Counsel for the complainant

Elizabeth Kosmidis  
Counsel for the respondent

Date of Hearing:

December 15, 1994

Place of Hearing:

Toronto, Ontario



This Board of Inquiry was appointed by the Minister of Citizenship on November 12, 1993 to hear and decide the complaint of Mary Audia, filed with the Ontario Human Rights Commission on July 21, 1988, alleging discrimination on the basis of sex by the respondent Workers' Compensation Board.

The respondent brought a motion to dismiss the complaint on six grounds:

1. The delay of six years on the part of the Complainant in filing this complaint with the Human Rights Commission;
2. The delay on the part of the Commission in investigating this complaint;
3. The failure on the part of the Commission to investigate this complaint properly;
4. Bias on the part of the original Investigating Officer.
5. The failure of the Commission to obtain a response from the Ministry of Labour;
6. The respondent suffered actual prejudice as a result of the delay and is thereby unable to fully respond to the allegations in the Complaint.

While the Statutory Powers and Procedures Act R.S.O. 1990 c. S. 22 section 23 clearly gives a Board the jurisdiction to dismiss a complaint if to proceed with a hearing would be an abuse of its process, the case law just as clearly establishes that this power

should be used sparingly. (Hyman v. Southam Murray Printing Ltd. (1981), 3 C.H.R.R. D/617; Guthro v. Westinghouse Canada Inc., (1992) 15 C.H.R.R. D/388).

### DELAY

The respondent cites delay in three of its six grounds; first there is the delay of Ms. Audia in bringing her complaint, then there is the delay of the Commission in investigating the complaint. These two delays taken together have created a twelve year passage of time from the circumstances that led to the first complaint to this hearing.

Ms. Audia's complaint to the Human Rights Commission rests on two separate decisions of the respondent, both of which Ms. Audia alleges were made based on the fact that she is female. The first decision was to place her in an unclassified salary category following a promotion in 1981 and the second was the failure to name her to a particular position in 1987. When she lodged her complaint with the Human Rights Commission in 1988 she complained about both decisions. The respondent states that it had no notice whatsoever of the 1981 complaint prior to 1988. The respondent points out there is a six month limitation in the Human Rights Code (section 34 (d)) which the complainant did not comply with in bringing the 1981 matter forward six years after it arose. The respondent argues that this failure is grounds to have the complaint dismissed by this Board.

The mandate of a Board of Inquiry is defined by section 39(1).

That section states, in part, that the Board shall "determine whether a right of the complainant under this Act has been infringed." The decision to appoint a Board is solely in the hands of the Commission. The Commission by section 34(d) may exercise its discretion to appoint a Board despite the failure of the complainant to comply with the six months limitation period. Section 39 of the Code instructs a Board to inquire into the rights of the complainant and not the actions of the Commission.

Section 23 of the Statutory Powers Procedure Act allows a Board to make orders to prevent abuses of its process. The respondent by ground six of its motion makes the argument that a hearing now, after such a long delay would create an abuse of process of this Board. The standard used by Boards in applying this section to complaints of delay is very high. Professor McCamus stated in Hyman v. Southam Murray Printing Ltd. (supra, page 621)

"...delay in initiating or processing a complaint should not be considered a basis for dismissing the complaint at the outset of the proceedings before a board of inquiry unless it has given rise to a situation in which the board of inquiry is of the view that the facts relating to the incident in question cannot be established with sufficient certainty to constitute the basis of a determination that a contravention of the Code has occurred."

The respondent argued that the death of a key witness has established such a situation, that is one in which the facts relating to the incident in question will not be able to be sufficiently established. It seems unlikely to this Board that



when dealing with such a large organization as the Workers' Compensation Board the death of one potential witness would mean the case could not be properly defended. Although some of the witnesses have retired or moved on to new jobs, there is nothing to indicate that they are unavailable. It was also established at the hearing of motion that there is voluminous documentary evidence to be presented to the Board at the hearing on the merits. If, however, during the course of the hearing, it becomes apparent that the passage of time renders the case impossible to prove or defend, the parties are free to bring a motion to that effect.

It is the decision of this Board that this complaint should not be dismissed at this time based on delay.

#### ACTIVITIES OF THE COMMISSION

The respondent further sought to have this complaint dismissed because of failure of the Commission to investigate this complaint properly and because of bias on the part of the investigating officer. It is the decision of this board that I have no function in reviewing the activities of the Commission. As early as 1981, in Hyman the Board said:

"Once the Minister has appointed a Board of Inquiry to 'hear and decide the complaint', it would be a surprising interpretation of the mandate conferred on the Board of Inquiry that would permit it to dismiss the complaint without making a decision as to its merits on the basis of the facts which must have been apparent to the Minister at the time of making the appointment." (supra, page 621)

This reasoning was elaborated on in Naraine v. Ford Motor Company

of Canada, unreported, Ont. Bd. of Inquiry, April 21, 1994 in which the dissent of Hartman in Findlay and Mackay v. Mike's Smoke and Gifts and Four Star Variety, unreported, Ont. Bd. of Inquiry, Oct. 22, 1993, is adopted:

"In my interpretation of the Code, concerns regarding the Commission's conduct or handling of a complaint prior to the appointment of a Board are not a matter going to that Board's prima facie jurisdiction, as determinable by that Board. ... In my view, such a focus at the outset of the inquiry was never contemplated by the Legislature in drafting the Code. It could not have been the Legislature's intention that human rights complaints would be dismissed by ad hoc Boards without a hearing into their merits, based on the Commission's handling or processing of such complaints." (page 19)

A Board of Inquiry has a duty to hear a complaint. The investigation of the Commission staff is not a matter for this Board to inquire into. I fully agree with comments made by the Board in Naraine (supra, page 20) that to engage in such an inquiry would "divert resources away from adjudicating the fundamental matters which underlie human rights disputes, and require boards of inquiry to sit in supervision over the bureaucratic processes of human rights investigations instead." Ms. Backhouse in Naraine v. Ford Motor Comapny did not dismiss the very real problems faced by respondents in defending themselves in these proceedings. Nor do I. The process is long and often very tangled, but at the end of the day bureaucracies must reform their mechanisms by careful and thoughtful analysis of their procedures. If the hearing reveals that the complaint was trivial, frivolous, vexatious or made in bad faith or caused undue hardship to the person complained against the remedy is to make an award of costs against the Commission. This would be done after a full hearing which would reveal that the

Commission was ill-advised to proceed and their decision to do so had caused harm to the respondent. It is not the role of this Board to pre-judge the complaint by reviewing the actions of Commission staff.

FAILURE TO OBTAIN A RESPONSE FROM THE MINISTRY OF LABOUR

Regarding ground five of the respondent's motion, I fail to see how the failure of the Commission to obtain a response from the Ministry of Labour could prejudice the respondent in this case. It was argued that since the complainant worked for the Ministry of Labour for two years during the course of these events the Ministry may have had relevant information. This may be true and the correct thing for the respondent to do is to call the relevant employees as witnesses. The Commission's decision that there is not enough evidence to make out a case of discrimination against the Ministry of Labour does not prejudice the respondent in defending the allegations brought against them.

For these reasons the motion is dismissed.

Dated January 16, 1995

Elizabeth Beckett

Elizabeth Beckett